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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

APPELLANTS,

v.

CROWN KOSHER SUPER MARKET OF MASS., INC.,
IRVING HEAFITZ,
MORRIS CHAITOVSKY,
RUTH B. COHEN, and
RABBI MOSES D. SHEINKOPF,

APPELLEES.

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Wyoming	Wyo. Comp. Stat. Ann., § 15-160, § 12-19, § 33-112 (1957)	Const. of 1890, Art. I, § 18; Art. VII, § 8; Art. XXI, § 25	yes	yes	no	no	*State* v. *Smart*, 22 Wyo. 154, 136 P. 452 (1913). Smart demurred to an information charging that counter to a statute he kept his liquor store open on Sunday. One of his contentions was that the statute violated XIVth Amendment equal protection clause because of the specific exceptions of many things which could be sold. Held, no violation of equal protection: applies alike to all liquor dealers. Question so certified by lower court, answered accordingly.

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APPELLANTS,

v.

CROWN KOSHER SUPER MARKET OF MASS., INC.,
IRVING HEAFITZ,
MORRIS CHAITOVSKY,
RUTH B. COHEN, and
RABBI MOSES D. SHEINKOPF,

APPELLEES.

BRIEF OF APPELLEES

I.
Statement

A. *Impact of the Lord's Day Act on Seventh Day Sabbath Observers.*

The complaint brought by the appellees in the district court was brought on behalf of a corporation, Crown

Kosher Super Market of Massachusetts, Inc.; three Orthodox Jewish customers of Crown Kosher on behalf of themselves and many others similarly situated; the Chief Orthodox Rabbi of Springfield for himself and on behalf of members of the Massachusetts Council of Rabbis, constituting approximately fifty in number.

All of the four stockholders of the corporation, its officers and directors are Orthodox Jews. Attached to the complaint as Exhibit "B" is a list of approximately four hundred Sunday customers of Crown Kosher, most of whom are Saturday Sabbath observers, all of whom signed their names personally to a petition in the Crown Kosher Super Market to indicate their solidarity with the plaintiffs in the suit below. (R. pp. 23-31, 109, 124).

The plaintiffs are not merely asserting abstract rights. The complaint alleges, and the court found that the Lord's Day Act interferes with and substantially injures these plaintiffs and those whom they represent in the exercise of their liberty and the use of their property. This conclusion of the district court involved subsidiary findings made under Rule 52(a) of Federal Rules of Civil Procedure concerning the proper observance of the Jewish Sabbath and the impact of the Act on the several plaintiffs. The following is a summary of some of these findings:

Due observance of the Jewish Sabbath requires total abstinence from business and work. Because of the religious beliefs of its officers, directors and stockholders, Crown Kosher is not open between sundown on Friday and sundown Saturday. Even if the store were open, the great majority of its patrons could not take advantage of its opening.

These Orthodox and Conservative customers may not ride in automobiles or other conveyances, or even walk extraordinary distances on their Sabbath. They may not shop or cook on the Sabbath, and spend most of the day-

light hours on Friday preparing for meals served during the twenty-four hours of the Sabbath, especially for the traditional family feast on Friday night.

Since Orthodox and other Sabbath observing Jews cannot shop on Friday night or Saturday and have spent the Sabbath as a day of rest or religious celebration and family communion, Sunday is the only day which has for them the advantages, as a shopping day, that Saturday has for the majority of people. Consequently, more than one-third of Crown Kosher's weekly gross sales are made on Sunday.

Business considerations make it impracticable to operate the Crown Kosher Market on Saturday night. If, after sundown, the store were prepared for business, few hours would remain before closing and the twelve employees (six of whom are butchers) would demand extra wages. Most customers would find it inconvenient, if not impossible, to shop during those night hours, especially those who have to travel significant distances, starting after sundown. For economic reasons similar to those preventing operation on Saturday night, it would not be practicable for Crown Kosher to sell only kosher meat from 6:00 AM to 10:00 AM on Sunday, as permitted by law. The few sales would not justify the great expense. (R. pp. 135-136).

If the Lord's Day Act is constitutional; the Crown Kosher Market can be open only five days of the week, none of which includes a day of the weekend when a large percentage of the week's sales is normally made. Even assuming that the store could stay in business on such a basis, it can do so only under great handicaps compared with other supermarkets. Also, Crown Kosher's Orthodox customers lose much of the value of their Sunday, since they may not shop on either Saturday or Sunday. Thus, the law puts an economic penalty on those who observe some other day than Sunday as the Sabbath by depriving

them of the productive use of one day further in the week. (R. pp. 145-146).

The law also imposes difficulties on the Rabbi-plaintiffs. They are hindered in their function of supervising the food to be eaten by the members of their congregations and they suffer great detriment in their efforts to have their congregations preserve due observance of the Jewish Sabbath and the dietary laws.

In addition to examining the direct effect of the statute on those who observe the seventh day of the week as their Sabbath, the district court found that the Lord's Day Act furnishes special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection to Christians and Jews who observe Saturday as the Sabbath to the prejudice of the latter.

B. *Background of Present Litigation.*

The plaintiffs below brought their suit before the three-judge United States District Court because the defendant was threatening to enforce the provisions of the Lord's Day Act against the corporate plaintiff.

The complaint as amended alleged that "unless restrained by this court the defendant will enforce G.L. (Ter. Ed.) c. 136, section 5" against the corporate plaintiff. (R. p. 36.)

At the time of the trial, a stipulation signed by counsel for both parties, was filed with the court, which read as follows:

> "I. Unless restrained in these proceedings, the defendant will enforce the provisions of Mass. G.L. (Ter. Ed.) c. 136 to the full extent of his authority." (R. p. 40).

There were certain prior state court proceedings which related to the enforcement of the Lord's Day Act. In order to eliminate the necessity of producing evidence concerning these proceedings, the following stipulation signed by counsel for both parties was filed with the court:

"II. There is no case now pending in the state courts of Massachusetts against the corporate plaintiff or its Manager, Harold Chernock, involving the enforcement of Mass. G.L. (Ter. Ed.) c. 136 or by either of them to stay proceedings under said Act.

The corporate plaintiff's Manager, Harold Chernock, was convicted by the District Court of Springfield for keeping open a shop on Sunday in violation of G.L., c. 136 at the address of the corporate plaintiff; the said Chernock appealed to the Superior Court for Hampden County and was convicted after trial. Thereafter, the said Chernock took his exceptions to the Supreme Judicial Court of Massachusetts. These exceptions were subsequently overruled in an opinion, *Commonwealth* v. *Chernock*, Mass. A.S. 1057 on November 13, 1957.

After the proceedings in the District Court of Springfield, the corporate plaintiff filed a bill in equity in the Superior Court of Hampden County to restrain Raymond [fol. 40] P. Gallagher, Chief of Police of the City of Springfield, from serving further complaints upon the petitioner until such time as the case of *Commonwealth* v. *Chernock* had been decided. The court issued such a preliminary injunction. Following the decision in *Commonwealth* v. *Chernock*, a final decree was entered dismissing the bill in equity." (R. p. 41).

The hearing proceeded on the basis of the foregoing stipulations. Indeed the only references by counsel to the suit in equity was to confirm the facts as stated in the stipulation. (R. p. 114, pp. 128-129).

Almost seven months after the trial, District Judge McCarthy, upon his own initiative, filed a group of papers with his dissenting opinion. These were made a basis for a motion for a new trial by the Attorney General. (R. p. 178). The motion was denied and the court filed a per curiam opinion. (R. pp. 179-182).

After giving a number of reasons why the court would not reopen the case because of these papers, the opinion concluded that "more important" was the fact that the movant wholly failed to demonstrate that "any new evidence is available which would affect the result." (R. p. 182).

These papers have now been printed as a "Supplemental Transcript of Record" in this appeal. Appellants' brief makes profuse references to them, and contains many assertions as to their meaning and effect some of which seem in direct conflict with the stipulation.

Contentions in appellants' brief based on these papers do not appear to be properly before this Court. They were not mentioned in the Jurisdictional Statement, nor were the papers themselves printed in the Statement as part of Judge McCarthy's opinion.

Appellees submit, as stated in the per curiam opinion, that these papers, even if properly before this Court, would not, in any event, affect the result of this litigation.

II.

Summary of Argument

A. *Procedural Points.*

1. The Individual Plaintiffs have Standing to Sue.

The Rabbis and the Orthodox Jewish customers have sufficient interest in the application of this statute to urge its unconstitutionality. cf. *Zorach* v. *Clauson*, 343 U.S. 306; *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203.

The Lord's Day Act imposes upon the Rabbi plaintiff, those Rabbis whom he represents and upon their congregations the Sabbath of other religious sects. It also directly hampers the Rabbis in the performance of their religious duties relating to the preservation of the Jewish Sabbath and the dietary laws of Orthodox Jewry.

While the Lord's Day Act protects those sects which celebrate Sunday as the Lord's day, it does not furnish similar protection to the individual customer plaintiffs, those whom they represent, and others who observe Saturday as the Sabbath. The Act also severely hampers these plaintiffs in obtaining the food required by their religion.

Although the statute makes no direct demands upon the individual plaintiffs, it violates their rights by unlawful public action and they are entitled to relief. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141; *Pierce* v. *Society of Sisters*, 268 U.S. 510.

These plaintiffs may also assert the rights of the corporate plaintiff because the Act operates directly upon the consummation of sales between the corporation and the customers. *Terrace* v. *Thompson*, 263 U.S. 197.

2. The Corporate Plaintiff has Standing to Assert Violation of Rights Under the First Amendment.

Cases permitting corporations to challenge statutes on due process grounds because of violations of freedoms under the First Amendment, *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Burstyn* v. *Wilson*, 343 U.S. 495, are particularly apposite here since the items sold by the corporation have religious significance cf. *Watchtower Bible and Tract Society* v. *Los Angeles County*, 181 F.2d 739 (CCA 9).

Furthermore, the corporate plaintiff may, in defense of its property, assert the religious rights of others involved in the same matter. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Terrace* v. *Thompson*, 263 U.S. 197.

3. The Three-Judge Court had Jurisdiction to Enjoin the Defendant, Gallagher.

The defendant Gallagher was not acting as a "purely local officer," but was acting on behalf of the Commonwealth of Massachusetts enforcing a law of state-wide concern. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), aff'd 352 U.S. 903; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89.

The very fact that the appellants in this suit include the Attorney General and the Governor of the Commonwealth of Massachusetts indicates that this is not merely a matter of local interest.

4. None of the Plaintiffs Is Barred from Maintaining This Suit and the District Court Properly Exercised Its Equitable Jurisdiction.

a. Arguments based on res judicata or collateral estoppel are not available to appellants on this appeal,

since such questions have not been properly presented to this Court. Res judicata or collateral estoppel is an affirmative defense and is not fairly comprised within the question "Should the Court have exercised its equitable jurisdiction?" Supreme Court Rules, Rule 15c.

b. Even if these affirmative defenses are properly before this Court, the prior proceedings in the state courts do not bar any of the plaintiffs from maintaining this action.

The bill in equity brought by the corporate plaintiff in the state court was merely to secure a stay of further complaints by the defendant until the appeal in *Commonwealth v. Chernock*, 336 Mass. 384 (1957) could be decided. After the decision, the subject matter of the suit in equity became moot and the action properly dismissed without reaching the merits. That suit does not bar the corporate plaintiff from bringing the present proceedings.

The criminal action which reached final judgment was brought against an individual, Harold Chernock. The corporate plaintiff was not a party to that suit. This proceeding is not brought to review the prior conviction but seeks to restrain the defendant from starting new criminal complaints. Even Harold Chernock could join as a plaintiff in this suit. In a new prosecution in the state court, Chernock could raise the federal unconstitutionality of this statute as this defense was not raised in the earlier prosecution. *Cromwell v. County of Sac*, 94 U.S. 351; *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), aff'd 352 U.S. 903. Therefore, he would not be barred from raising this defense here, especially since this question is purely a question of law. See *U.S. Moser*, 266 U.S. 236. It is clear that neither the corporate plaintiff nor the individual plaintiffs are barred by Chernock's conviction.

c. The Three-Judge Court Properly Exercised Its Equitable Jurisdiction.

The individual plaintiffs are entitled to equitable relief, *Evers* v. *Dwyer*, 358 U.S. 202, as this is the "*only* method" by which they can vindicate their constitutional rights. (R. 139).

Unless the defendant is hereby enjoined, the corporate plaintiff will be subject to multiple prosecutions, and if required to close on Sundays, will lose more than one-third of its gross sales. Where essential to property rights, equity will enjoin enforcement of criminal statutes. See *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, concurring opinion of Frankfurter, J. at 156, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605.

Any policy of deference to state courts is inapplicable since authoritative construction of the statute has already been made by the highest Massachusetts court. Compare *Harrison* v *N.A.A.C.P.*, 360 U.S. 167. The only question not decided is purely one of Federal law where the policy of abstention is wholly inapplicable. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.); aff'd 352 U.S. 903.

B. *The Lord's Day Act Is a Law Respecting an Establishment of Religion or Prohibiting the Free Exercise Thereof.*

1. It is an Act to Enforce the Observance of Sunday as the Sabbath.

a. The Act in the Massachusetts Legislature.

Although it is universally agreed that the Lord's Day Act, when enacted, had for its purpose the enforcement of the observance of the Sabbath, appellants' brief contends

that "by passage of time it has now become a regulation providing for a uniform day of rest and recreation." (p. 43).

An examination of the Lord's Day Act with all of its amendments indicates that nothing of the kind ever occurred.

The amendments to the Act are almost wholly concerned with increasing the number of activities which can be carried on for seven days a week instead of six. Moreover, the exemptions show a clear intention to preserve religious observance of the day. They are carefully worded so as to protect the hours of church worship on Sunday and constantly distinguish secular days and business from Sunday which requires "due observance".

b. The Act in the Courts of Massachusetts.

The decisions of the Massachusetts Supreme Judicial Court have viewed the Lord's Day Act as primarily a statute to enforce the observance of the Sunday Sabbath by penal legislation. *Davis* v. *City of Somerville*, 128 Mass. 594 (1880). A departure from this judicial view occurred in *Commonwealth* v. *Has*, 122 Mass. 40 (1877), where the court characterized the Lord's Day Act as a mere "civil regulation". Subsequent to that decision, until *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957), the court resumed its view that the purpose of the Act was "to secure respect and reverence for the Lord's Day". *Commonwealth* v. *McCarthy*, 244 Mass. 484 (1923).

The history and text of the Act and its almost continuous characterization by the Massachusetts Supreme Court, all combine to justify the finding of the district court that its purpose was to enforce the observance of Sunday as the Sabbath.

2. As a Law to Enforce the Observance of Sunday as the Sabbath, Mass. G.L., C. 136 is Unconstitutional.

The plaintiffs who are already under great social and economic pressure to conform to the customs of the majority, are, by virtue of the Lord's Day Act, compelled either to observe the Sabbath of another faith, or suffer severe hardship.

Application of the principles enunciated by this Court in a series of leading decisions make it clear that the Lord's Day Act is

> "a law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Everson v. *Board of Education*, 330 U.S. 1; *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203; *Zorach* v. *Clauson*, 343 U.S. 306.

3. If Sunday was Selected Primarily as "a Day of Rest" Because Already Observed as a Day of "Peculiar Sanctity" by the Great Majority, it Would be Violative of Plaintiffs' Rights Under the First Amendment.

Commonwealth v. *Has*, 122 Mass. 40, stated that Sunday was chosen as the day of rest "because a great majority of the people celebrate it as a day of peculiar sanctity". If such be the explanation, the Act intentionally relieves the followers of the majority faith from the burden of abstaining from secular pursuits for two days, but makes no provision for minorities who already so abstain on Saturday. In doing this, it favors one religion over another. Therefore, the Act is unconstitutional unless it exempts from its operation those who observe the seventh day as the Sabbath. See *Johns* v. *State*, 78 Indiana 332.

C. *The Lord's Day Act Constitutes a Deprivation of Liberty and Property Without Due Process of Law.*

As a civil regulation to enforce a "fixed period of rest", the Lord's Day Act bears no legitimate or reasonable relation to the public health or general welfare. Therefore, it is beyond the police power of the state so to interfere with the liberties of its citizens. *Society of Sisters* v. *Pierce*, 296 F. 928 (D. Ore.), aff'd 268 U.S. 510; *Opinion of the Justices*, 300 Mass. 615.

Even if we assume that it is a proper function of the state to make everybody rest on the same day each week, the Lord's Day Act as it stands today is no longer adapted to this purpose. Its manifold exemptions do not promote the "rest". In fact, many of the activities and the hours in which they are permitted indicate disturbance of rest.

In this case, basic First Amendment rights are abridged by the Lord's Day Act. To justify this curtailment, the danger to the public welfare must be serious and imminent. cf. *Pennekamp* v. *Florida*, 328 U.S. 331. No such condition is present here.

D. *The Lord's Day Act Denies to the Appellees the Equal Protection of the Laws.*

Whether it is a law to enforce observance of Sunday as the Sabbath or is a law to compel rest on Sunday because the great majority already observe it as a day of peculiar sanctity, the Lord's Day Act denies to the appellees, the equal protection of the laws.

Furthermore, without any rational basis for distinctions, the Act permits many businesses to be operated and many commodities to be sold on Sunday. Some of these are competitive with the corporate plaintiff's business. Many of these exceptions seem to have no basis other than successful

pressure on the legislature. This type of Sunday legislation is unconstitutional as a denial to the corporate appellee of the equal protection of the laws. cf. *Smith* v. *Cahoon*, 283 U.S. 553.

III.

Argument

A. *Procedural Points*

1. The Individual Plaintiffs Have Standing to Sue.

The district court found that:

> "What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances to those Christian sects and to Orthodox and Conservative Jews, who observe Saturday as the Sabbath and to the prejudice of the latter group." (R. p. 145)

Rabbi Sheinkopf brings this suit in his individual capacity as spiritual leader of the Orthodox Jews in Springfield and in a representative capacity for all the Orthodox Rabbis of Massachusetts. He is the religious leader of a sect severely impeded in adhering to one of its most basic tenets, the preservation of its Sabbath[1] by a statute which preserves and imposes on him and his congregation the Sabbath of other religious sects. His interest is analagous to that of the parents in *Illinois ex rel McCollum* v. *Board*

[1] See Appellants' brief in *Braunfeld* v. *Gibbons*, October Term 1960, #67, pp. 10 14.

of Education, 333 U.S. 203. (1948) and *Zorach* v. *Clauson*,[2] 343 U.S. 306. (1952).

More specifically the complaint alleges that the Rabbi plaintiffs cannot fulfill their religious functions relating to the dietary laws of Orthodox Jewry. (R. p. 16) The act challenged operates directly upon the functions of the Rabbis-plaintiff, and if enforced they "would be hindered in their function of supervising the food to be eaten by the members of their congregations and they would also suffer great detriment in their efforts to preserve, in these circumstances, due observance of the Jewish Sabbath and of the dietary laws by them." (R. p. 146).

Similarly, the plaintiff customers claim direct infringement of their religious liberties. This is a constitutional claim which every member of the prejudiced group would have standing to assert. (R. p. 145). Each member is "within the class of persons with respect to whom the act is unconstitutional" and "the alleged unconstitutional feature injures him." Compare *Heald* v. *District of Columbia*, 259 U.S. 114, 123, (1922).

There are more specific allegations and findings of the court which show direct injury to the religious liberty of the customer plaintiffs. They are seriously inconvenienced in procuring food prepared in accordance with the dietary regulations of their religion, and they are under a very substantial disadvantage as compared with shoppers whose Sabbath is observed on Sunday. They can only shop on five days in each week, whereas those who observe Sunday may make purchases on six days of each week. The result

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[2] The fact that the parents in these cases on appeal from state courts had standing is a precedent for standing in a federal court. *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398 at 403, (E.D. Pa. 1959), since this Court's findings of direct adverse interest, a requisite of standing, is independent of state court decision. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

of the law is the loss by the individual plaintiffs of much of "the value of their Sunday." (R. p. 16, 17, 145-146).

Although the individual plaintiffs are not subject to prosecution under the Lord's Day Act, this Court has long granted relief to parties "whose legal rights have been violated by unlawful public action although such action made no direct demands upon them." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141 (1951); *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Truax* v. *Raich*, 239 U.S. 33 (1915).

Appellants state in their brief (p. 26) that the standing of the individual plaintiffs to complain here of a denial of the free exercise of religion is not easily separated from consideration of the merits. However, whether or not the individual plaintiffs are finally entitled to relief does not determine whether they have standing to claim infringement of constitutional rights. The allegations of the complaint determine this question. *Accord*, *Bell* v. *Hood*, 327 U.S. 678 (1946). In the instant case the allegations claim direct interference with the plaintiffs' religious liberty. In *Tileston* v. *Ullman*, 318 U.S. 44 (1943), a case much relied upon by the appellants, this Court took pains to point out that the allegations did not claim infringement of plaintiff's liberty or property rights.[3]

2. The Corporate Plaintiff Has Standing To Assert Violation Of Rights Under the First Amendment.

Crown Kosher Super Market, the corporate plaintiff, caters primarily to Orthodox and Conservative Jews in

[3] Note that this Court has noted probable jurisdiction in *Buxton* v. *Ullman*, 147 Conn. 48 (1959), prob. juris. noted 28 U.S.L. Week 3346 (U.S. May 23, 1960) (No. 811), where the same Connecticut statute is again challenged by a physician, but here asserting alleged constitutional infringement of his own rights.

Springfield and the surrounding areas. It is the only super market supplying these Jews with kosher meat and other foods meeting the special and complex dietary regulations required by their religion. Because of the religious convictions of its stockholders, officers and managers, the store remains closed on the Jewish Sabbath, and because of the religious convictions of its Orthodox and Conservative customers, the latter would not make purchases on that day. Moreover, in order to preserve the religious significance of the products sold, the market must remain closed on Saturday. If it were open, it would not qualify as a kosher market on the remaining days of the week.

The complaint alleges that the corporate plaintiff will lose approximately one-third of its gross business if required to stay closed on Sunday. (R. p. 17). It is admitted that the corporate plaintiff may be prosecuted if it remains open on Sunday. (R. p. 54). The decisions of this Court clearly establish that the corporate plaintiff may attack the statute.

There is an important series of cases which permit corporations to challenge statutes directly on due process grounds because of violations of freedoms of the First Amendment. Thus in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), *Bridges* v. *California*, 314 U.S. 252 (1941), and, more recently, in *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), corporations asserted rights of freedom of press and speech. Also, *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503, 518-519 (E. D. Va. 1958) modified sub nom. *Harrison* v. *N.A.A.C.P.* 360 U.S. 167 (1959).

Appellees submit that Crown Kosher may similarly raise questions "under the First Amendment's guaranty of separation of church and state," see *Burstyn* v. *Wilson* supra at 505, especially since here state action interferes with the availability of goods having a religious significance. Obviously, it is irrelevant whether the kosher food

is sold by a corporation or by an individual. cf. *Watchtower Bible & Tract Society* v. *Los Angeles County*, 181 F.2d 739 (C.C.A. 9, 1950).

Even if, contrary to appellees' contention, the corporation is not allowed directly to challenge the statute on religious grounds, it may assert in defense of its property rights the constitutional rights of its customers, its stockholders and other Orthodox and Conservative Jews. This Court has repeatedly held that individuals and corporations may assert in defense of their property rights the constitutional rights of others involved in the same law or act.

The leading case on this point, and factually very close to the case at bar, is *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), where two schools, one religious and one military, could, in the protection of their property interests,[4] assert that a statute which made it a misdemeanor for parents not to send children to public school interfered unlawfully with the liberty of the parents.

Similarly, in *Terrace* v. *Thompson*, 263 U.S. 197 (1923) where a land owner wanted to lease land to an alien in violation of a state statute, it was held that both the owner and the alien had standing to attack the statute. "The owners have an interest in the freedom of the alien and he has an interest in their freedom to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them."[5] Other cases to this effect are *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 at 460, (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Pearl Assurance Co.* v. *Harrington*, 38 F. Supp.

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[4] It is entirely irrelevant for purposes of standing what percentage of sales are threatened by the state's action. Obviously, one-third of a corporation's business is still a property right. See, *Truax* v. *Corrigan*, 257 U.S. 312 (1921); *Liggett Co.* v. *Baldridge*, 278 U.S. 106 (1928).

[5] Thus the individual plaintiffs may also assert the rights of Crown Kosher.

411. (D. Mass. 1941), aff'd 313 U.S. 549 (1941); and *Buchanan* v. *Warley*, 245 U.S. 60 (1917). See also *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U.S. 434 (1944) where a corporation was allowed to raise the constitutional objections of its stockholders.

If appellants' contention is correct that the individual customers and Rabbis do not have standing, it becomes even more important that the corporate plaintiff be allowed to assert their rights. The need to protect fundamental rights of persons who would find it difficult to present their grievances is always a factor given weight by this Court.[6]

Even in cases where property interests were not necessarily involved, corporations were permitted to assert rights of its members. *Joint-Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 154, 186-187 (1951) (concurring opinion Frankfurter, J.; concurring opinion of Jackson, J.); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958).

Surely, in the present case, where property rights are clearly involved, and where the corporation has a close connection with its officers, stockholders and customers, the corporation has standing to assert their rights.

3. The Three-Judge Court Had Jurisdiction To Enjoin The Defendant, Gallagher.

It seems clear that in enforcing the criminal law of the Commonwealth, the Police Chief was acting on behalf of the Commonwealth of Massachusetts and not merely as a local officer. The appellants themselves recognize the interest of the Commonwealth in enforcing the Lord's Day

[6] The fact that others could assert the same rights may be the reason for some of the opinions (none of which was acceded to by a majority of the Court), in *Hague* v. *C.I.O.*, 307 U.S. 496 (1939). Moreover, in view of *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 at 458, 459 (1958) the statements in the earlier case are open to question.

Act since both the Attorney General and the Governor of Massachusetts are appellants in this suit. The Jurisdictional Statement (p. 6) claims that "a determination that the statute is unconstitutional will have a profound effect on the economy of the Commonwealth."

The very decisions cited by appellants indicate that the challenged statute embodies a policy of state-wide concern and is not a matter of local application. Compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935) and *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U.S. 903 (1956) with *Ex parte Public Bank*, 278 U.S. 101 (1928) and *Ex parte Collins*, 277 U.S. 565 (1928). Since defendant Gallagher is performing his duty "in the interest of the state and not simply in the interest of the locality where he serves" *Spielman Motor Sales Co.* v. *Dodge*, supra, the three judge court had jurisdiction. 28 U.S.C. §2281.

4. None of the Plaintiffs Is Barred from Maintaining This Suit and the District Court Properly Exercised Its Equitable Jurisdiction.

a. The Defense Of Res Judicata Or Collateral Estoppel Is Not Available On This Appeal.

Appellants argue that the corporate plaintiff is barred by some application of the doctrine of "res judicata" or "collateral estoppel" from raising the federal issue in this case.

However, even if this claim were valid, which appellees deny, res judicata or collateral estoppel cannot be now raised on this appeal. It was not a question set forth or fairly comprised within the Jurisdictional Statement as required by Rules 15 (c) 1 and 40 (2), Sup. Ct. Rules, cf. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175 (1938). Appellants' Notice of Appeal contained

the following as the third question presented: "Should the Court have exercised its equitable jurisdiction?" Res judicata and collateral estoppel are affirmative defenses and are quite different from the considerations determining equitable jurisdiction.

The very statement of facts in appellants' Jurisdictional Statement indicates that these affirmative defenses were not there contemplated. The argument raised in the brief is based both on a peculiar merging of Harold Chernock and the corporation, and on the alleged nature of a civil proceeding brought in the state court by the corporate plaintiff herein. However, in their Jurisdictional Statement, appellants did not claim "substantial identity" of Crown Kosher and Harold Chernock. They did not even annex to the Statement the documents (Supplemental Record) which they assert justify this claim. They even erroneously asserted that the state equity proceeding was brought by Chernock (Jurisdictional Statement, p. 7). Appellees submit, therefore, that this Court should not consider the argument based on res judicata or collateral estoppel.

b. Even If The Issue of Estoppel Is Properly Before This Court, The Prior Proceedings In The State Court Are Not A Bar To This Action As To The Corporate Plaintiff.[7]

The equity proceeding brought by the present corporate plaintiff in the state court merely sought to restrain enforcement of the Act pending final disposition of Chernock's appeal to the Massachusetts Supreme Judicial Court. It was not a bill which questioned the validity of the Lord's Day Act. Quite the contrary, it sought a stay until the appeal in *Commonwealth* v. *Chernock* could adjudicate the validity of the Act.

[7] It is, of course, apparent that the individual plaintiffs can in no way be connected with the state proceedings.

After the decision in *Commonwealth* v. *Chernock*, the complaint was properly dismissed. As shown by the stipulation, the Supplementary Transcript and the per curiam finding of the district court, this civil action "never reached the merits before its dismissal as moot." (R. 182). Therefore, it was not a final judgment.

The criminal proceedings against the individual Harold Chernock reached final judgment. The corporate plaintiff here was not a party to that suit, and hence the rules of estoppel do not apply. Restatement, Judgments § 93, Illustration 5. (1942).

Moreover, the prior conviction of Chernock would not even bar him from maintaining the present suit. The instant action is not an attempt to review his conviction for alleged violations of the statute in 1954, but is brought to restrain new prosecutions. Since the defense of federal constitutionality was not raised in the criminal case, Chernock himself is not estopped to raise it in a new prosecution and hence could raise it here. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876), Restatement, Judgments, § 70, Comment c.[8] *Accord, Brouder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U.S. 903. (1956). This is particularly true since the question not litigated was one purely of law. *Grandview Dairy* v. *Jones*, 157 F.2d 5 (C.C.A. 2, 1946), cert. denied 329 U.S. 787 (1946). See *U. S.* v. *Moser*, 266 U.S. 236 (1924). For these reasons any argument based upon merging Chernock and the corporate plaintiff into a single identity is irrelevant.

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[8] Although the Restatement does not purport to cover the scope of res judicata in criminal proceedings, it is apparent that courts would, if anything, be less apt to allow defenses on the grounds of collateral estoppel in criminal than they would in civil cases. See *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 874-880 (1952).

c. The District Court Properly Exercised Its Equitable Jurisdiction.

Plaintiffs in this suit seek a declaratory judgment and an injunction against enforcement of the challenged statute. The same considerations determining the standing of the plaintiffs determine whether a declaratory judgment should issue[9] and the justiciability of the suit. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, concurring opinion pp. 150-157 (1951):

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality . . ." *Evers* v. *Dwyer*, 358 U.S. 202, 203 (1958) quoting from *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

In the present case, there is a substantial controversy between all the individual plaintiffs, and the Commonwealth. It is only by equitable relief that they can vindicate their constitutional rights.

The defendant admitted that there exists an actual controversy between it and the corporate plaintiff. (R. p. 38). Unless these proceedings enjoin the enforcement of the Act, Crown Kosher will be subject to multiple prosecutions. It was stipulated, that unless here enjoined, the defendant would enforce the challenged statute to the full extent of

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[9] While the same criteria apply to declaratory judgments as to injunctions in determining justiciability, *Colgrove* v. *Green*, 328 U.S. 549 (1945) there may be "freer movement of the federal courts within the recognized confines of the scope of equity", ibid p. 552. See *Note, Declaratory Judgments in the Federal Courts*, 49 Harv. L. Rev. 1351 (1936), and footnote 6 of Rutledge, J. in *Turman* v. *Duckworth*, 329 U.S. 675 at 678 (1946), indicating that declaratory judgments may be appropriate in cases where a court would hesitate to issue an injunction.

his authority. (R. p. 40). The corporate plaintiff alleged, and the district court found, that if required to close down on Sunday, the corporate plaintiff would lose more than one-third of its gross business. (R. p. 13, 136).

Despite these circumstances which clearly present a case for equitable relief, *Ervers* v. *Dwyer*, 358 U.S. 202 (1958); *Browder* v. *Gayle*, 142 F. Supp. 707, (M. D. Ala. 1956) aff'd 352 U.S. 903 (1956); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Doud* v. *Hodge*, 146 F. Supp. 887 (N. D. Ill. 1956), aff'd sub. nom. *Moreg* v. *Doud*, 354 U.S. 457 (1957); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 621 (1912); cf. *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45 (1941), appellants urge that the district court "as a matter of reasonable deference to state jurisdiction, should have declined to accept Federal jurisdiction." (Brief p. 38).

In the instant case no purpose would have been served if the district court had "deferred" to state jurisdiction. *Hillsborough Township* v. *Cromwell*, 326 U.S. 620 (1946). So far as the Lord's Day Act applies to the Crown Kosher Market, the Massachusetts courts have authoritatively construed the Act to mean that it may not open on Sunday. The latest of these cases is *Commonwealth* v. *Chernack*, 336 Mass. 384 (1957), involving the manager of the corporate plaintiff.[10] No further determination of local law is needed as in *Harrison* v. *N.A.A.C.P.* 360 U.S. 167 (1959), nor are plaintiffs first required to seek remedies in the state courts. *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Baron* v. *O'Sullivan*, 258 F.2d 336, 337 (C.C.A. 3, 1958); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U.S. 196, (1924); *Carson* v. *Warlick*, 238 F.2d 724 (C.C.A. 4, 1956), cert. denied 353 U.S. 910 (1957). The only question left for the state court

[10] Prior decisions construing the Lord's Day Act to forbid the opening of a shop by a seventh day Sabbath observer were: *Commonwealth* v. *Has*, 122 Mass. 40 (1877); *Commonwealth* v. *Starr*, 144 Mass. 359 (1887); and *Commonwealth* v. *Kirshen*, 194 Mass. 151 (1907).

to decide is that of federal constitutionality. In such a case the doctrine of abstention is wholly inapplicable. *Browder v. Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U.S. 903 (1956); *Sterling Drug* v. *Anderson*, 127 F. Supp. 511. (E.D. Tenn. 1954).

Those cases which seem to suggest that the district court should not exercise its equitable jurisdiction to restrain enforcement of state statutes usually contain elements of anticipating state construction, or of interference in criminal prosecutions already in process, or of little or no damage to the parties in awaiting state action. None of these conditions is present in the instant case. *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935).

On the other hand, where substantial property damage is inflicted by enforcement of the statute, or where multiple prosecutions of the complainant are threatened, federal courts do not hesitate to exercise their equitable jurisdiction. *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Doud* v. *Hodge*, 146 F. Supp. 887, (N. D. Ill. 1956), aff'd sub. nom. *Morgy* v. *Doud*, 354 U.S. 457 (1957); *Toomer* v. *Witsell*, 334 U.S. 385 (1948); See *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 179 (1959); cf. *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45 (1941); compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 96 (1935).

And finally the federal courts are increasingly finding it their duty to act where basic civil or constitutional rights are involved. *Evers* v. *Dwyer*, 358 U.S. 202 (1958); *Gayle* v. *Browder*, 352 U.S. 903 (1956), affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Morrison* v. *Davis*, 252 F.2d 102 (C.C.A. 5, 1958), cert. denied 356 U.S. 968 (1958). All of these positive elements are present in the instant case.

It is therefore submitted that the court below was fully justified in exercising its equitable jurisdiction.

B. *The Lord's Day Act Is A Law Respecting An Establishment Of Religion Or Prohibiting The Free Exercise Thereof.*

1. It Is an Act to Enforce the Observance of Sunday as the Sabbath.

a. The Act In The Massachusetts Legislature

It is universally agreed that the Massachusetts Lord's Day Act had the original purpose of setting aside Sunday for the observance of the Sabbath by the dominant Christian sect. As will be seen, the decisions of the Massachusetts Supreme Judicial Court have repeatedly emphasized this fact. All of the judges on the three judge district court agreed in the instant case that the Massachusetts Lord's day statute was enacted for a religious purpose.[11] They differed apparently only on the question as to whether the Act today had acquired a different purpose.

It is significant that all of the intervenors below were religious organizations.

It is the claim of the appellants, however, that in some way and at some time this admittedly religious statute was converted into a mere civil regulation to provide a "day of rest." An examination of the Act itself, however, indicates that no such change occurred.

The multitude of amendments to the Act show a softening of the rigor of the original, but do not evidence any intent to establish a "day of rest." The contrary is true. Each of the many exceptions permits a new pursuit on Sunday. The effect of these amendments is to increase very sub-

[11] At the hearing below, even the dissenting judge revealed his feelings that the Act still had a religious purpose. See his remarks about believing in the Christian religion and giving it full faith and credit (R. p. 76) and his suggestion that Jews might go to the Synagogue on Sunday. (R. pp. 68-69).

sentially the number of activities which now may be maintained seven days in the week instead of only six. In fact some of the trade now permitted on Sunday may be carried on only upon the express condition that it is also followed during the other days of the week. For example, paragraph 2 of Section 6 permits the retail sale of tobacco by newsdealers "whose stores are open for the sale of newspapers every day in the week." Section 7 pertains to the granting of a license "to any reputable person who on secular days is a retail dealer in frozen desserts, etc." Section 6, 4th paragraph, permits bakers at certain hours on Sunday to sell "bread or other food usually dealt in by them."

This continuous process of activating the modern Sunday for secular pursuits does not constitute proof that the Massachusetts legislature changed the historical purpose of the Act so as to provide a universal "day of rest."

Far from evincing a desire on the part of the legislature to change the purpose of the Act from one to safeguard observance of the Sabbath, the Act itself and its amendments indicate the concern of the legislature to preserve the original purpose.

For instance:

1. In Massachusetts General Laws (Ter. Ed.) the Act is entitled "Observance of the Lord's Day". Provisions regulating hours and days of labor are contained in Mass. G.L. (Ter. Ed.) c. 149, entitled "Labor and Industries". When the Massachusetts Legislature intended to establish a day of rest, it said so clearly in c. 149, Sec. 48, providing for "at least 24 consecutive hours of rest, which shall include an unbroken period comprising the hours of eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days".

2. Sec. 3 of c. 136 (last amendment 1955) and Sec. 4 of c. 136 (last amendment 1956) both refer to public entertainments or licenses therefor on the Lord's day "in keeping with the character of the day and not inconsistent with its due observance". If the Lord's Day Act is merely a civil regulation setting apart a "day of rest", what is meant by "the character of the day" or "its due observance"?

3. The word "secular" appears frequently throughout the Act to contrast the Lord's day with the other days of the week.[12] Reference has already been made to some of the places where the word is used. There are, however, other paragraphs where the word "secular" appears, such as Sec. 6, 5th paragraph, which refers to "secular business and labor", and the older Sec. 12 (last amendment 1864), which provides a punishment for anyone who on the Lord's day permits persons on their premises to spend "their time idly or at play or in doing any secular business . . . ." (Apparently this section proscribes resting).

The popular meaning of the word "secular" as the antithesis of the word "religious" or "ecclesiastical", is confirmed by Webster's New International Dictionary Second Edition 1957, which defines the word "secular" in specific senses as follows:

> "(a) belonging to the state as distinguished from the church; (b) non-ecclesiastical; civil; (c) not religious in character nor devoted to religious ends or uses; not sacred; profane."

[12] The same distinction is made in Massachusetts decisions dealing with the Lord's Day Act. See *Brattle Films, Inc.* v. *Commr. of Public Safety*, 333 Mass. 58, 61 (1955).

4. Certain sections of the Act are especially devoted to maintaining the Lord's day as the Sabbath.

For instance, Section 10 permits certain parades on the Lord's day to various organizations for specific commemorative purposes, but provides that the music must be suspended within 200 feet of any place of public worship (1931).

Section 11 permits policemen and firemen to parade on certain special Sundays but the music must be suspended within 200 feet of any place of public worship (1931).

Section 22 (last amendment 1928) and Section 27 (last amendment 1931) forbid the issuance of licenses for sports or games "within 1,000 feet of any regular place of worship."

The foregoing sections indicate clearly a purpose to protect Sunday church worship. Nowhere in the General Laws, however, is such protection afforded to other sects and religions which conduct Sabbath day services on any other day of the week.

5. The same solicitude for Sunday worship is exhibited in the hours during which the new Sunday activities may be conducted. The time is carefully allotted to avoid the usual hours of Sunday morning church services. For instance:

a. Substantially all recreational activities may not begin until after 1:00 P.M. on Sundays. These include:

Outdoor lawn bowling, golf driving ranges, etc. Section 2 (last amendment 1956).

Licensed entertainments, etc. Section 4 (last amendment 1957).

Amusement parks and beaches. Section 4A (last amendment 1946).

Licenses to operate bowling alleys. Section 4B (last amendment 1946).

Private industrial trade expositions. Section 6, 8th paragraph, (last amendment 1957).

Participation in or witnessing athletic sports or games. Section 21 (last amendment 1954).

b. Many of the exceptions contained in Section 6 also carefully protect the church hours. Among these are the following:

Retail sale of bread before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M. (2nd paragraph).

Transportation of general commodities by motor truck or trailer before 8:00 A.M. and after 8:00 P.M. (4th paragraph).

Transportation of petroleum products by motor truck or trailers before 6:00 A.M. and after 10:00 P.M. (4th paragraph).

Selling of bakery products by bakers before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M. (4th paragraph).

Sale of kosher meat by observers of the seventh day as the Sabbath, between 6:00 A.M. and 10:00 A.M. (4th paragraph).

Business of bootblack before 11:00 A.M. (5th paragraph).

No other provisions of the General Laws protect from such secular activities the hours of worship by persons who observe the Sabbath on some day other than Sunday. It is impossible to make a rational reconciliation between the foregoing provisions and the "day of rest" theory. The rumbling of trailer trucks through the streets before 6:00

o'clock in the morning is hardly conducive to Sunday morning rest. The operation of bakery shops before 10:00 A.M. forces activities during the morning rest hours. If a kosher meat shop opened at 6:00 A.M. on Sunday and had any patronage at that hour, this would not add to the "rest" of the neighborhood. And one may ask why a kosher meat shop disturbs a day of rest after 10:00 A.M. but not before that hour. Just why a bootblack may operate until 11:00 A.M. is hard to fathom except possibly to take care of customers who want their shoes shined before going to church.

The history of the Lord's Day Act in the Massachusetts legislature is therefore marked by:

(a) A total absence of any evidence that its original purpose was changed; and
(b) positive amendatory provisions to protect the religious observance of Sunday as the Sabbath; and
(c) positive amendatory provisions that contradict the "day of rest" theory by permitting more and more secular work and activities on Sunday.

b. The Act In The Courts Of Massachusetts

From the earliest to modern times the decisions of the Massachusetts Supreme Judicial Court have viewed the Lord's Day Act as primarily a statute "to enforce the observance of the day (the Sunday Sabbath) by penal legislation". *Davis v. City of Somerville*, 128 Mass. 594, 596 (1880).

The only departure in this stream of judicial opinion occurred in 1877 when a Seventh Day Adventist charged with opening a shop on the Lord's day raised the issue of unconstitutionality by claiming that the Act was in derogation of the Eleventh Amendment to the Constitution of the Commonwealth, which provided that "No sub-

ordination of one sect or denomination to another shall ever be established by law". It was the opinion in this case, *Commonwealth* v. *Has*, 122 Mass. 40 (1877) which, without any analysis of the statute or evidence, or reference to previous opinions, suddenly characterized the Lord's Day Act as "essentially a civil regulation, providing for a fixed day of rest . . .".

As will be seen, the Massachusetts Supreme Judicial Court paid no further attention to this characterization except merely to refer to the authority of *Commonwealth* v. *Has* in one subsequent case where the defendant pleaded that he observed the seventh day as the Sabbath. This case and *Commonwealth* v. *Has* will be considered later.

The appellants base their claim that the Lord's Day Act is constitutional upon the characterization of the statute made in *Commonwealth* v. *Has*. Even if the federal courts ar not bound to accept a state court's characterization of local legislation but may look at the actual purpose of the Act[13] as expressed therein, *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955); *Coppage* v. *Kansas*, 236 U.S. 1, 15-16 (1914), the views of a state court concerning the purpose of legislation are entitled to respectful consideration.

In the instant case, the district court studied the history and provisions of the statute and the opinions of the Massachusetts Supreme Judicial Court concerning the purpose of the Lord's Day Act. It came to the conclusion that:

> "The characterization of the Sunday law as being merely a civil regulation providing for a 'day of rest'

[13] Appellants' brief seems to confuse characterization with construction or interpretation of the Act. The district court fully accepted the state court's construction of the meaning of the Lord's Day Act.

> seems to have been an *ad hoc* improvisation in *Commonwealth* v. *Has*, supra, because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state constitution if the religious motivation of the statute were more explicitly avowed." (R. p. 142).

It is submitted that this conclusion by the district court was amply justified. For the purpose of bringing this out clearly, appellees' brief will consider rather extensively the Massachusetts cases dealing with the Lord's Day Act. This may be helpful in bringing out the unique position of the opinion in *Commonwealth* v. *Has* in the line of Massachusetts decisions.

The cases are divided into two groups, those not involving Seventh Day Sabbath observers and those in which constitutionality was pleaded by Sabbatarian defendants.

(1) *Cases Not Involving Seventh Day Sabbath Observers.*

One of the early decisions is *Pearce* v. *Atwood*, 13 Mass. (13 Tyng) 324 (1816). This case held that the Lord's day statute did not authorize a Justice of the Peace to arrest a traveler on the Lord's day. In a long decision considering the Act, the court says at page 348:

> "It would certainly seem extraordinary, that a statute, enacted for the sole object of insuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments should authorize acts which, from their necessary publicity, would be likely to cause more disturbance to devout people than all the irregularities intended to be cured."

And on Page 345, there is an interesting discussion of the Jewish Sabbath versus the Christian Sabbath. In the course of the discussion, the court says:

> "It is true, from the fourth command in the Decalogue it may be inferred, that one day in seven was, according to the divine will, to be set apart as a day of rest from labor. But none will contend, that the day therein sanctified is the day which Christians are bound to keep as holy time; or that any of the rigid laws of *Moses* relative to the observance of that day are now in force. It is enough to observe, that, by the universal consent of Christians, another holy day has been substituted . . .".

Bennett v. *Brooks*, 91 Mass. (9 Allen) 118 (1864), holds that a will may be validly executed on the Lord's day, but nevertheless quotes with approval the preamble to the Lord's day statute of 1791 c. 58:

> "Thoughtless and irreligious persons, not attentive to the duties and benefits of the Lord's Day, do profane the same by unnecessarily pursuing their worldly business and recreations on that Day, to this, our great damage, as members of a Christian society; . . .".

In *Jones* v. *Inhabitants of Andover*, 92 Mass. (10 Allen) 18 (1865), a suit to recover damages for injuries due to a defective way, the court refers to "the legality of the plaintiff's act in using the highway on the Sabbath".

In *Commonwealth* v. *Sampson*, 97 Mass. (1 Browne) 407 (1867), the decision holds that the gathering of sea-weed was not a work of necessity and characterizes the pro-

hibited act as a disturbance of the peace and quiet of the Lord's Day, and from its evil effect and example, . . ."

In *McGrath* v. *Merwin*, 112 Mass. 467 (1873), a suit to recover damages for gratuitously helping defendant to clear out a wheel pit on the Lord's day, the court differentiates the "Lord's day" from any "secular day".

In 1877, the opinion in *Commonwealth* v. *Has*, 122 Mass. 40, made its unsupported assertion that the Lord's Day Act was "essentially a civil regulation".

Three years after *Commonwealth* v. *Has*, the court, in *Davis* v. *City of Somerville*, 128 Mass. 594 (1880), dealing with a suit for damages due to a defective way by a plaintiff returning from a funeral on the Lord's day by an indirect route, ignored its opinion in *Commonwealth* v. *Has* and reverted to the original purpose of the Act in the following language, on page 596.

> "The statute making it unlawful and criminal to travel on the Lord's day, except from necessity or charity, has retained its place in our statute-book from the earliest times in the history of the state. Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time. Whatever inconveniences might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the

same rules as would govern us in the interpretation of any other statute."

Commonwealth v. *Dextra*, 143 Mass. 28 (1886), presents a rather unusual use of precedent by the Massachusetts Supreme Judicial Court. In that case a barber who kept his shop open on Sunday claimed that barbering was a work of necessity and, therefore, within the exception provided for in Section 5. The court following *Commonwealth* v. *Has* held that the exception of works of necessity applied only to the offense of doing labor, and not to the separate offense of keeping open a shop.

However, in discussing the purpose of the Act, the court discarded *Commonwealth* v. *Has* and on page 31 expressly ruled that the purpose of the Act was as originally intended:

> "The Legislature intended by this statute to keep the ordinary places of traffic, business and work closed on this day, so that those persons who desired to relax from labor and business, and attend to private and public worship, might not be disturbed by persons pursuing their worldly business and avocations in open shop. This statute is substantially the same as that enacted in 1791, c. 58. The preamble to the latter statute sets forth at length the reasons for its passage, and is applicable to the statute now in force, as well as to the several laws enacted upon this subject since that time."

The preamble referred to in the above quotation as still applicable is quoted in *Commonwealth* v. *White*, 190 Mass. 578 (1906).

This case, decided twenty-nine years after *Commonwealth* v. *Has*, discusses the purpose and history of the

Lord's Day Act at considerable length. The case involved the question of whether the picking of cranberries on Sunday, when delay might endanger the crop, was a "work of necessity". The opinion contains no reference to *Commonwealth* v. *Has* or to its assertion that the Lord's Day Act was a mere "civil regulation". Instead, in unmistakable language, the court made it clear that the purpose of the statute was religious. The following, beginning on page 580 of the opinion in *Commonwealth* v. *White*, was quoted in the majority opinion in the instant case but is worth repeating. The paragraphing of the quotation is our own and not from the original opinion:

> "In construing this statute it is to be borne in mind that so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes. One of these is in the following language:
>
> > 'Whereas it is the duty of all persons, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons; therefore,' etc. See Prov. St. 1760-61, c. 20 § 1; 4 Prov. Laws, (State ed.) 415.

Perhaps the most instructive preamble is that which precedes St. 1791, c. 58, which was the first general statute passed on this subject after the adoption of our State Constitution.[14] It reads as follows:

> 'Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life: Be it therefore enacted,' etc.

Such was the idea of the Lord's day for the observance of which this system was devised."

Forty-six years after the decision in *Commonwealth* v. *Has*, the court again emphasized the religious character of the Lord's Day Act. In three separate cases under the first title of *Commonwealth* v. *McCarthy*, 244 Mass. 484 (1923), the court considered the legality of the transporta-

[14] This "most instructive preamble" is the one referred to in *Commonwealth* v. *Dextra*, supra.

tion and delivery on Sunday of bread by the bakers to their customers who were licensed victuallers. G. L. c. 136, Section 6, permitted the *making* and *selling* by bakers, or their employees, on the Lord's day before 10 o'clock in the morning and between the hours of 4:00 and 6:30 o'clock in the afternoon, of bread or other food usually dealt in by them. Two of the defendants *delivered* their bread to their regular customers within the designated hours. There was no other way by which their customers, common victuallers, could secure the bread except by its delivery to them. Nevertheless, the defendant's exceptions were overruled and the court ordered judgment to be entered on the verdict of guilty in each case.

The opinion of the court on Page 486 contained the following language:

> "The delivery of bread outside the premises of the baker on the Lord's day is not a work of necessity within the meaning of the Lord's day statute. The statute prohibiting the performance of labor, business or work, except works of necessity and charity, on Sunday, was enacted to secure respect and reverence for the Lord's day."

The opinion then cites with approval the language previously quoted (p. 35) from *Davis* v. *City of Somerville*, 128 Mass. 594 (1880).

(2) *Cases Involving Seventh Day Sabbath Observers.*

We have seen that the Massachusetts Supreme Judicial Court has from earliest to modern times characterized the Lord's Day Act as setting up a religious Sabbath. When, however, the defendant pleaded in defense that he observed Saturday as the Sabbath, the court ignored its own

characterization and held that the Lord's day statute merely set aside a rest period.

However, the court did not immediately make this switch. *Commonwealth* v. *Hyneman*, 101 Mass. 30, 31 (1869), was a prosecution of a licensed victualler for selling liquor on the Lord's day. The defendant offered to "prove that he was a Jew, conscientiously believing that the seventh day was the Sabbath. *His conscientious belief might protect him from a prosecution for violating the provisions of the Gen. Sts. c.84, by acts of secular labor on the Lord's day* (see § 9, provided he violated no other law." * (Gen. Sts. c.84, sec. 9 is now G.L. c.136, sec. 6). "But it is no excuse for his violation of the law respecting the sale of intoxicating liquors."

The next case was *Commonwealth* v. *Has*, 122 Mass. 40 (1877), previously mentioned.

This was on a complaint that the defendant unlawfully kept open his shop on the Lord's day.[15] The defendant testified that he conscientiously believed the seventh day ought to be observed as the Sabbath, that he observed it and disturbed no one. He also raised the question of constitutionality under the Massachusetts Constitution.

In its opinion the court rejected both defenses. As to the first, the opinion ruled that keeping open a shop was a different offense from "performing of secular business or labor on the Lord's Day" and that, therefore, the conscientious belief in and observance of the seventh day as the Sabbath was not a defense.

The court then proceeded to dispose of the defense that the Act as to the defendant subordinated his sect (Seventh

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* Emphasis supplied.

[15] The complaint charged Gehring Has, the defendant, with keeping open his shop on the Lord's day, "to the great scandal of religion, against good morals and good manners, and against the peace of said Commonwealth and the form of the Statute made and provided".

Day Adventist) to the domination of the other Christian sects. It was this defense which evoked the characterization that the Lord's Day Act was "essentially a civil regulation", in the following language:

> "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement; some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community." (p. 42).

As we have seen, this view of the Lord's Day Act is a departure from previous and subsequent decisions by the Massachusetts Supreme Judicial Court.

The next case in which a Sabbath day observer pleaded the unconstitutionality of the Lord's Day Act in defense to a prosecution for violation was *Commonwealth* v.

Chernock, 336 Mass. 384 (1957). The defendant was the manager of the corporate plaintiff in the instant case. The defendant pleaded that the market was closed on Saturday because of his religious convictions and that the enforcement of G.L. (Ter. Ed.) c. 136 because the shop was open on Sunday was a violation of his religious rights under the Constitution of Massachusetts. The court disposed of this defense in one sentence, at p. 386:

> "That the rights of the defendant to religious liberty and equality . . . under the Constitution of this Commonwealth are not violated by the enforcement of the instant statute is settled. *Commonwealth* v. *Has*, 122 Mass. 40, 42." [16]

From the foregoing, it will be seen that the characterization of the Lord's Day Act as merely a "civil regulation" to establish a "fixed period of rest" occurs in only one decision of the Massachusetts Supreme Judicial Court namely, *Commonwealth* v. *Has*. The opinion in *Commonwealth* v. *Chernock* simply rests its decision on the former case without discussion.

Since the opinion in *Commonwealth* v. *Has* was at variance with the entire course of judicial opinion in Massachusetts concerning the purpose of the Lord's Day Act and has no firmer basis than an unsupported out-of-hand assumption, the majority opinion of the district court was fully justified in its finding that the primary purpose of the Lord's Day Act was to enforce the observance of Sunday as the Sabbath.

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[16] In two additional cases the defendant pleaded, in defense that he conscientiously observed Saturday as the Sabbath. However, the constitutional question was not raised in either case and the opinions did not discuss the purpose of the Lord's Day Act. These cases were: *Commonwealth* v. *Starr*, 144 Mass. 359 (1887); and *Commonwealth* v. *Kirshen*, 194 Mass. 151 (1907).

2. As A Law To Enforce The Observance Of Sunday As The Sabbath, Mass. G.L. c. 136 Is Unconstitutional.

The plaintiffs in this case conscientiously believe that Saturday is the true Sabbath. Apart from the Lord's Day Act, they are already under tremendous social and economic pressure to abandon this tenet of their faith and to conform to the pattern of the majority religions. For this the state is not responsible,—it is the unescapable burden of a minority.

However, the Commonwealth of Massachusetts is using the machinery of its criminal law to compel the plaintiffs to observe a second Sabbath, not their own.

The Act confronts the plaintiffs with a dilemma, either horn of which inflicts injury upon them:

a. If the plaintiffs abstain from secular transactions on their Sabbath, then the corporate plaintiff will be open to its customers approximately only four and one-half days a week, thereby suffering a disastrous penalty because of the religion of its owners; its Orthodox (and many Conservative) customers will be unable to purchase food sanctioned by their religion (or any other food) from Friday afternoon until Monday of each week; the task of the Rabbis in supervising the condition of kosher meat, usually delivered on Thursday or Friday, will be greatly complicated because it would have to be kept until Monday. (R. pp. 122-123).

b. If the plaintiffs engage in secular business on Friday night and Saturday, the corporate plaintiff will have surrendered its character as a market for Orthodox Jews, its stockholders, also Orthodox, will have violated Jewish law, its Jewish customers will have abandoned their Sabbath day observance, and

> the Rabbis will have lost control over the religious practices of the members of their congregations.

In either case, the free choice of religion by seventh-day Sabbath observers is seriously hampered by the Lord's Day Act.

The state thus is invading the field of religion with its most potent force, the criminal law. The use of penal sanctions by a controlling sect against dissenters was the bitter historical experience which led the founders of our Republic to formulate the clause in the First Amendment pertaining to religion. The Act is clearly:

> "a law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

It would seem needless for appellees' brief to cite to this Court its own language concerning the meaning of the above words. In a series of truly great decisions, in majority and minority opinions, they have been given judicial construction commensurate with a basic constitutional principle. The most quoted definition is in *Everson* v. *Board of Education*, 330 U.S. 1, 15-16, (1947), cited in the majority opinion below, (R. pp. 144-145) and in a number of the briefs. In *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203 (1948), they received further interpretion as a "spacious concept" with a "secular reach far more penetrating in the conduct of government than merely to forbid an established church." Additional definitions are found in the majority opinion and dissents in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Under the principles enunciated by this Court, the Supreme Court of New Jersey, in *Tudor* v. *Board of Education*, 14 N.J. 31, 100 A. 2d 857 (1953), interpreted and applied the Amendment to for-

bid the distribution of a Protestant sponsored Bible to public school pupils.

The Lord's Day Act by enforcing observance of Sunday as the Sabbath is a law which aids one religion or prefers one religion over another, or that, through severe economic pressure and serious inconvenience, influences those who believe in the seventh day Sabbath to observe the Sabbath of another religion.

The New York Court of Appeals has expressly stated that the Sunday law of that state could not be sustained on religious grounds, *People* v. *C. Klinck Packing Co.*, 214 N.Y. 121, 108 N.E. 278 (1915). The Massachusetts Supreme Judicial Court has implicitly admitted that the Lord's Day Act, if a religious statute, would be unconstitutional, by suddenly—and temporarily—dropping its own view that the purpose of the act is to enforce observance of the Sabbath when a defendant challenged its constitutionality.

There are only three opinions of the United States Supreme Court which discuss Sunday closing laws. In *Soon Hing* v. *Crowley*, 113 U.S. 703 (1885), the Sunday closing (of laundries) was not involved although the opinion indicated it would have been valid. *Hennington* v. *Georgia*, 163 U.S. 299 (1896), merely raised the question as to whether the Sunday law conflicted with the Commerce clause of the Constitution. *Petit* v. *Minnesota*, 177 U.S. 164 (1900), did not involve a seventh day Sabbath observer. All three cases are quite old and were decided before it was held that the Fourteenth Amendment made the prohibitions of the First Amendment applicable to state statutes. All of them are almost completely bare of the considerations before this Court in the instant case.

The one case involving a seventh day Sabbath observer was *Friedman* v. *New York*, 341 U.S. 907 (1951). Friedman, a retailer of kosher meat, was convicted of opening his store on Sunday, appealed to the New York Court of

Appeals, *New York* v. *Friedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950), and then appealed to this Court on constitutional grounds. His appeal was dismissed per curiam without opinion for want of a substantial federal question. We do not know why the Court came to this conclusion. However, the record does not indicate that the New York law is a religious statute. Nor is it clear that there was serious financial loss to the defendant because of the statute. Unlike the instant case, there was no showing of the unique importance of the store to the Jewish community, of the hardship on customers because of inability to supply dietary needs, or of interference with Orthodox Rabbis in the performance of their functions. Nor was any stress laid upon the pressure which the State of New York was bringing upon Jews, through its Sunday statute, to abandon their own observance of their Sabbath on Saturday. In the instant case the religious character of the Lord's Day Act and the hardship which it imposes on seventh day Sabbath observers are both firmly established.

3. If Sunday Was Selected Primarily as "A Day of Rest" Because Already Observed as a Day of "Peculiar Sanctity" by the Great Majority, It Would Be Violative of Plaintiffs' Rights Under the First Amendment.

The opinion in *Commonwealth* v. *Has*, after stating that the Act is "essentially a civil regulation" to create "a fixed period of rest", goes on to explain that Sunday was selected as the day because the "great majority celebrate it as a day of peculiar sanctity". If this were the fact, then the law manifestly favors the followers of the majority Christian faiths and penalizes the minority who conscientiously observe their own Sabbath on Saturday. According to this exposition of the assumed purpose of the Lord's Day Act, the Massachusetts Legislature:

> Chose Sunday because this would not interfere with the liberty of members of the dominant Christian faiths since they already observed Sunday as the Sabbath;
>
> Compelled Saturday Sabbath observers to abstain from secular pursuits on a second day, thus reducing to five, and even four and a half days, the weekly time available to them for secular work and business.

The discrimination involved in this situation has been recognized by a number of states, which have expressly exempted seventh day Sabbath observers from the operation of their Sunday laws. The courts in some of these states have ruled that the law would be unconstitutional without such exemption. *Johns* v. *State*, 78 Indiana 332 (1881); *People* v. *Bellet*, 99 Mich. 151, 57 N.W. 1094 (1894); *Krieger* v. *State*, 12 Okla. Cr. 566, 160 Pac. 36 (1916); *Cohen* v. *Webb*, 175 Ky. 1, 192 S.W. 828 (1917). See also *Cincinnati* v. *Rice*, 15 Ohio 225 (1846), *Canton* v. *Nist*, 9 Ohio St. 439 (1859); *Kut* v. *Albers Super Markets*, 76 Ohio App. 51, 63 N.E.2d. 218 (1945).

The Massachusetts Lord's Day Act contains similar exempting language in the 5th paragraph of section 6:

> "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby."

However, when *Commonwealth* v. *Has* decided that the words "secular business and labor" did not include the opening of a shop, factory or warehouse, much of the substance of the exemption evaporated.

Appellees therefore submit that the Lord's Day Act is unconstitutional "as applied to the plaintiffs in this action, insofar as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday". (Judgment of the Court below, R. p. 176).

C. *The Lord's Day Act Constitutes A Deprivation Of Liberty And Property Without Due Process Of Law.*

It is familiar constitutional law that the state may not curtail the liberties of its citizens or deny them the use of their property unless such be justified as promoting the health, morals, safety or welfare of the community.

Assuming that the Lord's Day Act is merely a "civil regulation" to promote a "fixed period of rest", it should be noted that it is not a statute to provide a day of rest. Another statute, Mass. G.L. c. 149 has this purpose. The Lord's Day Act forces the entire population (subject to exceptions and exemptions) to "rest" on the same day in each week. The preliminary question, therefore, is whether it is within the police power of the state to provide not merely for one day of rest in seven, but for a fixed day to be universally observed.

Nowhere in the record of this case is there any factual background material to justify appellants' assertion that the welfare of the community requires all citizens to rest at the same time. There are speculations and arguments, but no data to support them.

Appellants' brief, Appendix B, lists five states as having repealed their Sunday laws, namely Arkansas, California, Iowa, North Carolina and Wisconsin. In these states, apparently, a general Sunday closing law is no longer deemed essential to the public welfare. Modern conditions and progressive labor legislation have rendered unnecessary

any welfare aspects of state enforcement of religious commandments.

However, even if we assume police power exists to enforce universal rest on the same day each week, the Lord's Day Act is not adapted to accomplish this result. "Unless there exists a reasonable relation between the character of the legislation and the policy to be subserved" *Society of Sisters* v. *Pierce*, 296 F. 928 (D. Ore. 1924), aff'd *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the statute is an unconstitutional deprivation of liberty and property without due process of law. In the *Opinion of the Justices*, 300 Mass. 615 (1938), the Massachusetts Supreme Judicial Court declared invalid a proposed ordinance to regulate the hours that barbershops might be open because it bore no reasonable relation to its stated purpose.

Appellants' brief relies upon *Commonwealth* v. *Has*, for an explanation of the purpose of the Lord's Day Act. This opinion asserts that the Act is to enforce rest from "ordinary avocations and the amusements of the community." However, the Act fails in these purposes.

The articles and services which may be sold on the Lord's day are numerous, and the hours when these transactions are permitted bear no relationship to the alleged "rest" which they are supposed to bring. On the contrary, the stated hours frequently indicate disturbance of rest rather than otherwise. Some of the permitted activities on the Lord's day are indicated in the footnote.[17]

So far as resting from "amusements" is concerned, the Lord's Day Act is replete with exceptions in favor of

[17] Tobacco may be sold by innholders, victuallers, druggists and newsdealers open every day of the week, Section 6, paragraph 2; bread before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M., Section 6, paragraph 2; frozen desserts and mixes, Section 6, paragraph 2; soda water, Section 6, paragraph 2; confectionery, Section 6, paragraph 2; fruit, Section 6, paragraph 2; live bait, Section 6, paragraph 2; meals not consumed on the premises, Section 6, paragraph 3; gasoline, Sec-

sports and recreation.[18] The only limitations other than to obtain permits and to comply with regulations are that these amusements may not be maintained during the morning hours when people go to church, and that some of them may not be indulged in within a thousand feet of any regular place of worship.

The permitted activities seem to represent, for the most part, pursuits and businesses successfully demanded by pressure groups. Appellees submit that the continued prohibition against the opening of certain types of shops is merely a vestigial remainder of a comprehensive law, which, if ever related to "rest" purposes, has now become obsolete.

Appellants' brief contends, contrary to *Commonwealth*

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tion 6, paragraph 3; oil, Section 6, paragraph 3; motor accessories (vehicles, boats and aircraft), Section 6, paragraph 3; letting of horses, carriages, boats, motor vehicles, bicycles, Section 6, paragraph 3; letting of sports equipment on trains, Section 6, paragraph 3; printing, publishing, sale and delivery of newspapers, Section 6, paragraph 4; wholesale and retail delivery of milk and its transportation, Section 6, paragraph 4; transportation of general commodities (before 8:00 A.M. and after 8:00 P.M.), Section 6, paragraph 4; transportation of petroleum products (before 6 A.M. and after 10:00 P.M.) Section 6, paragraph 4; transportation of livestock, farm commodities and farm equipments for fairs, exhibitions, sporting events and veterinary purposes, Section 6, paragraph 4; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale, Section 6, paragraph 4; the making of butter and cheese, Section 6, paragraph 4; the making or selling by bakers or their employees of bread and other food usually dealt in by them, Section 6, paragraph 4; the keeping open of a shop for the sale of Kosher meat (between 6:00 A.M. and 10:00 A.M.), Section 6, paragraph 4; business and labor by Saturday observers, Section 6, paragraph 5; the business of a bootblack, Section 6, paragraph 5; the digging of clams, Section 6, paragraph 5; icing and dressing of fish, Section 6, paragraph 5; the sale of catalogues of pictures and other works of art, Section 6, paragraph 6; preparation for and conducting private industrial trade expositions, Section 6, paragraph 8; the sale of fruits and vegetables by the person who raised the same or by his agent on premises owned or leased by him, Section 6, paragraph 9.

[18] For instance, Section 2 permits tennis, golf and driving on miniature golf courses. Section 4 permits public entertainments including

v. *Has*, that one of the purposes of the Act is to provide a universal day of recreation. This suggestion that police power may be used to enforce recreation sharpens even further the issue concerning the right of the state to curtail the liberty of its citizens, especially those guaranteed under the First Amendment.

When First Amendments rights are involved, the courts are astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs concerning matters of public convenience are insufficient to justify the diminishing of the exercise of rights vital to the maintenance of democratic institutions. *Schneider* v. *Irvington*, 308 U.S. 159, 161 (1939). The interference with First Amendment rights should be weighed against the alleged public benefits. The evil must be extremely serious and the degree of imminence extremely high before such abridgements will be sustained. *Cf. Pennekamp* v. *Florida*, 328 U.S. 331 (1946).

This test of constitutionality has found expression in this Court in cases holding that the rights guaranteed by the First Amendment hold a preferred position among constitutional rights. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

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musical entertainment by mechanical or electrical means, radio and television in public dining rooms, and the operation of motion pictures. Section 4A permits the maintenance and operation upon the Lord's day of amusement parks and beach resorts, including the right to operate bowling alleys, shooting galleries, photographic galleries, games and "such amusement devices as may lawfully be operated therein on secular days." Section 6 permits private industrial trade expositions. Section 17 permits fishing by licensed fishermen if not for commercial purposes. Section 21 permits athletic sports or games specifically including baseball and basketball. Sections 22 and 27 permits sports and games on designated playgrounds. Section 25 permits outdoor exercises not involving the elements of contest. Section 26 permits participation in and witnessing of athletic sports and games in which the contestants do not receive any pecuniary reward.

However phrased, this Court has recognized that there must be a real danger to the public welfare to validate the substantial intrusion of the police power into the protections of the First Amendment. These cases cannot be disposed of by the mere claim that there is a "presumption" of validity to legislative enactments. While much respect is given to legislative determinations in the field of economics, legislative invasions in the areas of fundamental freedoms are far more carefully scrutinized. *Kovacs* v. *Cooper*, 336 U.S. 77, concurring opinion p. 95 (1949).

Here the interference with the liberty and property of the plaintiffs is substantial and severe. No urgent need of the public welfare justifies this situation. If the Crown Market remained open after 10 a.m. on Sunday it would hardly disturb the truncated "rest" or amusements of the community.

Moreover, the Lord's Day Act is not the kind of a statute which can be lightly referred to the legislature for a just amendment. It represents the wish of a majority religious group. Unlike laws which are merely foolish or illogical, this is not legislation which ordinarily brings its own cure through experience. As long as the same group remains in power, it usually is satisfied with its preferred status and is often bitterly resentful of efforts to change it. The normal political processes cannot be relied upon for amendment or repeal, cf. *United States* v. *Caroline Products Co.*, 304 U.S. 144, footnote 4 p. 152 (1938), and for this very reason the First Amendment was adopted.[19]

D. *The Lord's Day Act Denies To The Appellees The Equal Protection Of The Laws.*

Whether as a statute to enforce the observance of Sunday as the Lord's day or as a statute to promote a fixed

[19] See the discussion of legislation of this character in Appellants' Brief, *Braunfeld et al.* v. *Gibbons*, October Term 1960, No. 67.

day of rest, the Act denies to the appellees the equal protection of the laws.

By selecting Sunday, a day already observed as the Sabbath by the great majority, the Act accommodates them by making sure that they will not have to abstain from secular pursuits two days in the week. On the other hand, the appellees and others who observe the seventh day as the Sabbath are not so accommodated. If they are faithful to their own religious tenets, they are forced to abstain from secular pursuits two days a week instead of one. This solicitude for the convenience of the "great majority" of another faith and disregard for the harsh results inflicted on the appellees, clearly denies to the latter the equal protection of the laws. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

The Lord's Day Act also constitutes a denial to the corporate appellee of equal protection of the laws and the majority opinion of the district court so found. (See discussion in the opinion, and the footnotes at R. pp. 146-147).

The exemptions provided in Secs. 6 and 7 of c. 136 permit the sale on Sundays by others of many food stuffs and other products similar to those sold by the corporate appellee. For example, Secs. 6 and 7 of c. 136 permit certain persons to keep their places of business open on Sundays for the retail sale of frozen desserts, frozen mixes, confectionery, fruit, tobacco, milk, ice, bread and other food usually dealt in by bakers. In addition, Sec. 6 of c. 136 permits certain persons to keep their places of business open on Sunday for the wholesale sale of certain food stuffs, including poultry, bread, fruit and vegetables.

The result of the statutory exemptions is discrimination against the corporate appellee in that it compels the closing of its store while permitting other stores similarly situated to remain open for business on Sundays. There would seem to be no rational basis for such discrimination.

In fact, having in mind the alleged purpose of the Act, some of its results seem absurd. For instance, it may be debatable whether the sale of tobacco on Sunday (or any other day) is beneficial to the health and welfare of the community, but there can be no doubt that the purported "day of rest" is not furthered by permitting the sale of tobacco on Sunday to newsdealers only if they are open every other day in the week.

Other exemptions in c. 136 permit the sale of many items not commonly sold in stores like that of the corporate appellee. However, it is difficult to see how the sale of food products by the corporate appellee would interfere with the alleged purpose of the Act to an extent greater than the sale of such other articles.

Discriminations in the Lord's Day Act violate the Equal Protection Clause because they bear no reasonable relationship to the alleged purpose of the statute. cf. *Smith* v. *Cahoon*, 283 U.S. 553, 566-567 (1931).

State court cases involving Sunday laws frequently turn on particular statutes and ordinances. A case which closely resembles the instant case is *Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 29 (1938) which was a prosecution for keeping open a grocery store on Sunday. The court there said:

> "If it be conceded that the general welfare is served by requiring one day of rest in each seven days, excepting only works of charity and necessity, the ordinance we are considering fails to attain this purpose. No reason is suggested and we can think of none why the shop of a dressmaker or milliner should be required to close while the cigar store remains open. None is apparent why a dry goods store should be required to close when a newsstand continues to operate. We do not see where the public welfare is served by closing the grocery store and allowing a confec-

tionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate. Under this ordinance a bakery which sells bread must be closed but a shoe-shining shop which sells cigars and newspapers is unaffected. A motion picture theater with its mechanical acting and mechanical music may run, while a legitimate theater with human actors and musicians must refrain from operation. These distinctions appear to us to be entirely arbitrary, without relation to the public health, safety, morals or welfare." (p. 454)

To the same effect, see *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1937) and *Gronland* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948).

The foregoing cases involved statutes of general application. Other statutes and ordinances have been held invalid where they were specifically directed against certain types of stores. *Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926); *Arrigo* v. *Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951); *ex parte Hodges*, 65 Okla. Cr. 69, 83 P. 2d 201 (1938); *ex parte Ferguson*, 62 Okla. Cr. 145, 70 P. 2d 1094 (1937). See also, *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952); *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929).

Since the Lord's Day Act itself discloses that "Many classes of work which are excepted are surely no less destructive of public rest and relaxation than the opening of the Crown Market would be", (R. p. 147), the Act denies to the corporate appellee the equal protection of the laws.

IV.
Conclusion

For the foregoing reasons the appellees submit that the judgment of the district court should be affirmed.

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